IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

TUESDAY, THE 13TH MARCH 2007 / 22ND PHALGUNA 1928

Crl.Rev.Pet.No. 542 of 1999()

CRA.127/1996 of II ADDL. SESSIONS COURT, PALAKKAD
SC.7/1993 of ADDL.ASSISTANT SESSIONS COURT, PALAKKAD

REVN. PETITIONER(S):

CHENTHAMARA,
S/0.KRISHNAN,
RAGHAVAPURAM,
POLPPULLY,
PALAKKAD DISTRICT.

BY ADVS.. SRI.P.VIJAYA BHANU,
SRI.S.R.MANOJ &
SRI.ALAN PAPALI.

RESPONDENT(S):

STATE OF KERALA, represented
BY PUBLIC PROSECUTOR, HIGH
COURT OF KERALA, ERNAKULAM.

PUBLIC PROSECUTOR SRI. C.K.SURESH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 13/03/2007 THE COURT OF THE SAME DAY PASSED THE FOLLOWING:

K.HEMA, J.

CRL.R.P.NO. 542 OF 1999

Dated this the 13 day of March, 2007

O R D E R

Is actual entry of penis through vagina essential, to constitute “rape” under section 375 of the Indian Penal Code ('IPC' for short)? In the absence of penile-vaginal entry, will the offence of “rape” be made out, under Section 375 IPC? What does the expression “penetration” in Explanation to section 375 IPC mean? These are the main questions which arise for consideration in this revision.

2. **Facts briefly**: A girl aged 12 years is the alleged victim in this case. The accused is her neighbour. On the crucial day, she went to his house, as usual, to play chess. She played chess with accused's brother and also the accused. Thereafter, the accused asked the girl to keep the chess board back in the room. When she went to the room with the chess board, accused accompanied her and, on reaching the room, he closed her mouth, took her to a corner of the room and committed rape on PW1. The accused let the child go, on seeing blood trickling down her leg.

3. The accused was charge sheeted for offence under Section 376 IPC. After trial, learned Assistant Sessions Judge found the accused to be guilty of attempt to commit rape and convicted and sentenced him to undergo rigorous imprisonment for a period of three years for attempt to commit rape, under Section 511 read with Section 376 IPC. In appeal, the said conviction was confirmed by learned Sessions Judge but, sentence was reduced to rigorous imprisonment for a period of one year. The accused challenges the conviction and sentence in this revision.

4. Learned counsel appearing for revision petitioner vehemently contended that the conviction for attempt to rape is totally unsustainable, since both trial court as well as appellate court held that there was no “penetration” or even “partial penetration” into the vagina. “Penetration” is an essential ingredient of section 375 IPC, but there was no “penetration” or even “partial penetration”, as per the evidence of the doctor PW4, and Ext.P2 wound certificate also. Hence, it cannot be said that there was any attempt to rape, it is argued. The doctor, PW4 stated in the chief examination itself that the hymen was intact and it was also stated by the doctor that in a case where hymen is intact, there may not be even “partial penetration”, it is pointed out. To constitute an attempt to rape, there must be at least a partial penetration, is the argument.

5. It is also contended that though medical evidence would reveal that there was an injury on the “labia”, that will not be sufficient to constitute “penetration” or “partial penetration”, as required for a conviction for attempt to rape under section 511 of 376 IPC. According to learned counsel for petitioner, the act committed by accused would only attract offence under section 354 IPC, but “indecent assaults are often magnified into attempts at rape” and in this case also there was just a mere sexual assault which falls short of “penetration” or “partial penetration” but it was held to be a case of attempt to commit rape.

6. Relying upon the dictum laid down in the decision of Supreme Court in in Aman Kumar v. State of Haryana [2004 (4) SCC 379], it was strongly argued by learned counsel for petitioner that the approach in magnifying indecent sexual assaults as rape is to be deprecated and such approach is neither correct nor legal. In the absence of any evidence of any “penetration” or “partial penetration”, the sexual act committed would only constitute offence under section 354 IPC, as held in Aman Kumar's case, it is argued. The following extract from the above decision was relied upon by learned counsel for petitioner:

> “Significantly, the evidence of the prosecutrix and the doctor does not specifically refer to penetration which is sine qua non for the offence of rape. There is no material to show that the accused were determined to have sexual intercourse in all events. In the aforesaid

> background, the offence cannot be said to be an attempt to commit rape to attract culpability under Sections 376/511 IPC. But the case is certainly one of indecent assault upon a woman....under Section 354 IPC.....Indecent assaults are often magnified into attempts at rape." (emphasis supplied)

7. Learned Public Prosecutor, on the other side, argued that though there was no penetration, as per medical evidence, the doctor, PW4 stated that there was a small linear abrasion 1 cm. length over the inner aspect of right labia and there was congestion and tenderness over the injured area. Therefore, the act committed by accused is more than a mere sexual assault which falls under section 354 IPC, and there is absolutely no reason to interfere with the conviction for attempt to commit rape. The conviction is only sustainable and the sentence also does not warrant any interference since, it was reduced by the learned sessions judge, it is submitted.

8. On hearing both sides, I find that it is essential to clearly understand what constitutes "rape" under Indian Penal Code, to take a proper decision on the facts of this case. Without understanding what "rape" is, as defined under section 375 IPC, it may not be possible to decide what act may amount to an attempt to rape. "Rape" is defined under section 375 IPC and it reads as follows:

> "375.Rape.--A man is said to commit "rape" who, except in the case hereunder excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:--

First.--Against her will.

Secondly.--Without her consent.

Thirdly.--With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly.--With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.--With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.--With or without her consent, when she is under sixteen years of age.

Explanation.--Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.--Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."

9. A reading of Section 375 IPC shows that to commit "rape", a man must have "sexual intercourse" with a woman. The Supreme Court, by referring to offence of "rape", held in **Sakshi** v**. Union of India,** (2004) 5 SCC 518 that "sexual intercourse" is heterosexual intercourse involving penetration of the vagina by the penis". So, going by the plain language in section 375 IPC, particularly, the opening of the section, to commit the offence of "rape", "sexual intercourse" is essential and, to have sexual intercourse, "penetration" of vagina by penis is also essential. That means, the male organ must pass through the vagina i.e., there must be penile-vaginal entry.

10. Needless to say, even the slightest penile-vaginal entry will amount to “sexual intercourse”. In other words, it is ESSENTIAL that there must be at least the slightest penetration to attract “sexual intercourse”. But, as per the Explanation to section 375 IPC, "penetration is SUFFICIENT to constitute the sexual intercourse” necessary to the offence of rape. If “penetration is ESSENTIAL for sexual intercourse”, (without which, there cannot be any sexual intercourse), what is meant by saying that “penetration is SUFFICIENT for the sexual intercourse”? How can the same ESSENTIAL/INEVITABLE factor be described as a factor which may be SUFFICIENT to constitute a particular fact ? Does it mean, that the “penetration which is essential for the sexual intercourse ordinarily” is different from the “penetration which is necessary for constituting the offence of rape”?

11. The language in the provision seems to be quite puzzling and paradoxical. Apparently, it would appear that there is an anomaly in the provision. But, this anomaly in the provision, (rather, a `legal riddle', I may call it), needs to be analysed, harmonised and answered, to understand the real legislative intent behind the puzzling usage of the relevant expression “penetration”, in the provision. Therefore, for the time being, for the sake of a discussion, it is only reasonable to infer that though

ordinarily, to constitute “sexual intercourse”, male organ must pass through vagina , as per the Explanation to section 375 IPC, some thing other than such “penetration” is sufficient, to effectuate the “sexual intercourse” which is necessary to constitute the offence of “rape”.

12. But, what is such “penetration” ? What did the legislature contemplate by the expression, “penetration” in the Explanation ? This shall be my main probe in this case. The word “penetration” is not defined in the IPC. The word, “penetrate”, as per 'The Concise Oxford Dictionary', means “the act or process of making way into or through something”; “to enter or pass through or force a way into or through”. The dictionary meaning of the word, “penetration” was considered in the context of “rape” by the Supreme Court in **Tarkeshwar Sahu v. State of Bihar (2006) 8 SCC 560** and it was held (vide para 12), “the word “penetrate”, according to Concise Oxford Dictionary means, “find access into or through, pass through”.

13. Thus, the process of finding access through; making/forcing a way through; passing through something **OR** finding access into; making/forcing a way into something, is “penetration”. Here, the words, “**through**” and “**into**” strike the difference and those are clearly distinguishable, as evident from the word, “or” coming in-

between. While in the former, there is passing through some thing ie., there is an actual entry through something, in the latter, there is only a process of making or forcing a way into or towards something, without there being an actual entry through some thing. But, both are "penetration", going by the dictionary meaning.

14. So, if the first meaning is attributed to the word "penetrate", in sexual intercourse, it would follow that the male organ must **PASS THROUGH** vagina or it must make a way through vagina i.e., there must be an actual entry of penis through vagina. But, if the second meaning is applied, it would be sufficient, if penis finds an **ACCESS INTO** or makes/forces a way into or towards vagina, for which, there need not be any entry of penis through vagina. But, during such process of accessing, the male organ would necessarily and forcibly come into contact with some other portions of the external female private part. Therefore, going by the dictionary meaning, such penile-accessing towards vagina can also be treated as "penetration", in reference to sexual intercourse.

15. Thus, it follows that ordinarily, the act of penis **PASSING THROUGH** vagina i.e., the actual entry of penis through vagina (penile-vaginal entry) is essential to constitute the "sexual intercourse", which is referred to in the opening of section 375 IPC. Whether such entry is complete, partial or slight, it will amount

to such "sexual intercourse". But, as per the Explanation to the same section, it is sufficient if penis finds only an **ACCESS INTO** vagina, without there being an actual entry of penis through vagina and during such process, the male organ comes into contact with any other external portions of female genital organ such as, vulva/pudendum, labia majora, labia minora etc., and that would also constitute the "sexual intercourse" which is necessary for the offence of "rape". Thus, to put it short, though ordinarily, "**penile-vaginal entry"** is essential to constitute sexual intercourse, "**penile-accessing"**, which is described above is sufficient to attract the sexual intercourse which is necessary for the offence of "rape", by virtue of the Explanation to section 375 IPC.

16. Necessarily, the corollary also follows, that by virtue of the Explanation to section 375 IPC, an actual passing of penis through vagina ("**penile-vaginal entry**") is not quite essential to constitute offence of "rape". "**Penile-accessing**" into/towards vagina is sufficient (ie., penis finding access into/towards vagina, without there being any entry of penis through vagina, and during such process, penis getting contact with any of the external portions of the female genital organ) to constitute "rape", as laid down in the Explanation to section 375 IPC. The expression "penetration", which is referred to in the Explanation to section 375 IPC, according to

me, is such "penile-accessing" which I have explained above.

17. Thus, "penetration" referred to in section 375 IPC is something lesser in extent, nature and degree than what is ordinarily understood by the word "penetration", in common parlance, in the context of sexual intercourse. By virtue of the Explanation to section 375 IPC, in legal parlance for the sexual intercourse which is necessary for the offence of "rape", penile-vaginal entry is not a must, but even in the absence of such entry or rupture of hymen, offence of "rape" can be committed.

18. The courts, therefore, need not proceed under any impression that to constitute an offence of "rape" under section 375 IPC, there must necessarily be an actual entry of penis through vagina, resulting in rupture of hymen etc. If, as per the prosecution case, there is only a case of "penile-accessing" as explained by me above, which also constitutes the sexual intercourse necessary to the offence of "rape", there may not and need not be any rupture of hymen nor any injury on the vagina nor presence of any sperm in the vaginal smear etc. Even in the absence of any of these things, offence of "rape" defined under section 375 IPC will be clearly attracted.

19. While laying down the provision relating to "rape", the legislature appears to have been aware of the ground reality that

ordinarily, a man may not sexually break through the female private part by his genital organ, except for committing the heinous crime of "rape". That appears to me, the reason why, an act which is lesser in degree than a penile-vaginal entry is also made "sufficient" to constitute sexual intercourse, by the peculiar language in the Explanation to section 375 IPC, even though ordinarily, penile-vaginal entry is an inevitable requirement for sexual intercourse.

20. The Supreme Court and various High Courts of this country, have made clear the import of the peculiar language in the provision and those are reflected in their various decisions. Though not in so many words, and not by interpreting the meaning of the expression, "penetration" in the manner in which I have done in this judgment, the dictum laid down in those decisions reconcile with what is laid down by me. The decisions on the point are legion, but I shall cite only a few on the relevant point. Referring to "penetration", it has been held in **Mohammed** v. **State of Kerala** [1987 (2) KLT 565] as follows:

> "Partial penetration of the penis with the Labia Majora or the vulva or pudendum with or without emission of semen was held sufficient for the purpose of law."

21. In **State of U.P.** vs. **Babulnath**(1994) 6 SCC 291, it has been held as follows:

> "Even partial or slightest penetration of the male organ within labia majora or the vulva or pudendum with or without any emission of semen or even an attempt at penetration into the private part of the victim would be enough for the purpose of sections 375 and 376 of IPC."

22. In **Aman Kumar** v. **State of Haryana** (2004) 4 SCC 379, the Supreme Court held as follows:

> "Even a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of the hymen is not necessary. Vulva penetration with or without violence is as much rape as vaginal penetration. The statute merely requires evidence of penetration, and this may occur with the hymen remaining intact. .....In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little....."(emphasis supplied).

23. But, before discussing anything on the dictum laid down in the above decisions, it is essential that the definitions of the various relevant expressions used therein are looked into. Errors are quite often committed by the courts, even in understanding the ratio in the decisions, mostly because of their failure to understand the meaning of the relevant expressions which are very often used in cases involving offence of "rape". That is what has happened in this case also. Hence, I shall proceed to deal with the relevant expressions next.

24. "Labia majora" is the external portion of the female private part, which is covered by pubic hair and there is no tract or passage

in this area unlike vagina, and there cannot be any entry of penis through labia majora, as in the case of vagina. The definitions of labia majora and vagina in Wikipedia, the free Encyclopedia can be looked into for a better understanding of the position. Labia majora is defined as follows(vide Internet site, http://en.wikipedia.org/wiki/Labia_majora):

> "The **Labia Majora** are lip-like structures comprised mostly of skin and adipose tissue, which extend on either side of the vulva to form the cleft of venus through the middle. **After puberty, it is frequently covered with pubic hair.** When standing or with the legs together, they usually entirely or partially cover the other parts of the vulva. Protection is the main function".

25. The "vagina" is defined thus (vide http://en.wikipedia.org/wiki/Vaginal_orifice):

> "The human **vagina** is an elastic muscular canal that extends from the cervix to the vulva. Although there is wide anatomical variation, the length of the unaroused vagina is approximately 6 to 7.5 cm (2.5 to 3 in) across the anterior wall (front), and 9 cm (3.5 in) long across the posterior wall (rear)..... The vagina connects the superficial vulva to the cervix of the deep uterus".

26. The "vulva" also is the external genital organ of a female and this is also called "Pudendum". It is the collective name given to the various external portions of female private part as a whole and this will not include the internal part like vagina, which alone has the passage or tract which may allow entry of penis. "Vulva" is defined

(vide http://www.luckymojo.com/faqs/altsex/vulva.html and see also en.wikipedia.org/wiki/vulva) as follows:

> "Vulva (pudentum):This term is a collective designation for the external genitalia of the female. It consists of: the (1)mons pubis, (2) labia majora, (3) labia minora, (4) clitoris and (5) perineum".

27. "Labia Minora" is defined (vide http://en.wikipedia.org.wiki/labia) as follows:

> "The labia minora .. are two longitudinal cutaneous folds, that may vary widely in size from woman to woman. They are situated between the labia majora, and extending from the clitoris obliquely downward, lateralward, and backward on either side of the vulval vestibule, between which and the labia majora they end"

28. Thus, the Supreme Court in **Aman Kumar**'s case held that to prove the offence of "rape" in section 375 IPC, it is sufficient to establish that there is penetration in the vulva ; and to prove "penetration", it is sufficient if there is clear and cogent evidence that some part of the "virile member" is within the "labia" of the "pudendum" of the woman. The same principle was laid down in **Babulnath's case and Mohammed' s case** and various other decisions also. In cases in which there was no passing of the male organ through vagina and consequently, there was no rupture of hymen also, it was held that to establish "penetration" necessary to constitute offence of "rape", it is sufficient if it is proved that

there is penetration into vulva/pudendum, labia majora etc.

29. Needless to say, that there is no passage or canal in vulva/pudendum, labia majora etc., like that of vagina and hence, during penetration into these areas, there will not be passing of penis **through** these portions, as in the case of vagina. In such cases of "penetration", there can only be act of male organ finding access into/towards vagina, without there being an actual entry of penis through vagina and in such process, the male organ may getting touch with the external portions of the female genital organ like labia majora etc. According to me, it is such process of "penile-accessing", which the Supreme Court and this court described as, "penetration into labia majora, pudendum, vulva" etc., in the decisions cited above. This is the type of "penetration" which is referred to in the Explanation to section 375 IPC.

30. As per the dictum laid down in the above decisions, therefore, the "penile-accessing" (which I have elaborated above) would be sufficient to constitute the "penetration" in the sexual intercourse, which is necessary for the offence of "rape", which occurs, even in the absence of actual entry of the male organ through vagina or rupture of hymen etc. Though the said conclusion is arrived at by the Supreme Court, not by explaining the meaning

of the word "penetration," as I have done in this judgment still, I find that both conclusions tally. Thus, in my humble view, my conclusions on the relevant point, though not in the same words, are supported by the various decisions of the Supreme Court and this court also.

31. But, the lower courts failed to understand the import of the expression "penetration" in section 375 IPC and hence, committed a mistake in entering a finding that there was only an attempt to commit rape in this case. Both the courts below believed PW1 and PW4, the victim and the doctor and there is absolutely no reason to interfere with the concurrent findings on the acceptability of their version. Despite believing PW1 and PW4, learned Sessions Judge held that the evidence of PW1 is not sufficient to prove that "any part of the virile member of the accused entered within the labia of her pudendum" and hence, there was only an attempt to commit rape and that rape is not proved. It is evident that learned sessions judge failed to understand the meaning of the expressions, "virile member of the accused", "the labia" or "pudendum" etc. and this has led to the grave error in entering a finding that there was only an attempt to "rape". No doubt, the findings are contrary to the facts proved in this case also.

32. The doctor, PW4 stated that the hymen was intact and

though this may indicate that there was no passing of penis through vagina, it will be clear from what I have laid down that the court cannot come to a finding that there was no rape, in the absence of "penile-vaginal entry" alone. As per the medical evidence, a small linear abrasion 1 cm in length was caused over the inner aspect of right labia and there was also congestion and tenderness over the injured area. Thus, from the evidence of PW1 and the doctor PW4, it is evident that the male organ was forcing its way into or towards vagina of the victim, and in such process, penis came into contact with labia and injury was also caused thereon. As held by me above, such "penile-accessing" would clearly attract "penetration", which is referred to in the Explanation to section 375 IPC, as sufficient to constitute sexual intercourse necessary to the offence of rape.

33. Still, both the courts below held that prosecution failed to prove "penetration". This led to the further mistake in holding that the act committed amounts to an attempt to rape only. In fact, the act committed in this cases, constitutes offence of rape itself, as defined under section 375 IPC and, as specifically explained in the Explanation to the said section. I find absolutely no reason to accept the arguments advanced by learned counsel for petitioner that the act committed falls short of even attempt to rape and that it is only an indecent sexual assault attracting offence under section 354 IPC.

34. Anyway, the conviction entered was only for attempt to commit rape and the sentence awarded by the trial court for such attempt was further reduced also by learned Sessions Judge. The State has not challenged the wrong conviction or the sufficiency of the sentence awarded. In such circumstances, I find absolutely no reason for interference and this revision fails.

This petition is dismissed.

Sd/-

K.HEMA, JUDGE.

Krs.